UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA, Plaintiff, and NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SIERRA CLUB, Intervenor-Plaintiffs, v. DTE ENERGY COMPANY AND DETROIT EDISON COMPANY, Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BASED ON COMPLIANCE WITH PRE-CONSTRUCTION PROJECTION REQUIREMENTS

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40 C.F.R. § 52.21(b)(41)(ii)*(c)* 10

40 C.F.R. § 52.21(r)(6)(i)*(c)* 10

40 C.F.R. § 52.21(r)(6)(ii) 5

CONTROLLING OR OTHER APPROPRIATE AUTHORITY

Preamble to EPA's 1992 NSR Rules Amendments

57 Fed. Reg. 32,314 (July 21, 1992)

Preamble to EPA's 2002 NSR Rules Amendments

67 Fed. Reg. 80,186 (Dec. 31, 2002)

Relevant Federal Regulations

40 C.F.R. § 52.21(a)(2)(iii)
40 C.F.R. § 52.21(a)(2)(iv)
40 C.F.R. § 52.21(b)(2)(iii)
40 C.F.R. § 52.21(b)(20)
40 C.F.R. § 52.21(b)(23)
40 C.F.R. § 52.21(b)(41)(i)
40 C.F.R. § 52.21(b)(41)(ii)
40 C.F.R. § 52.21(b)(48)(i)
40 C.F.R. § 52.21(r)(6)(ii)
40 C.F.R. § 52.21(r)(6)(iii)
40 C.F.R. § 52.21(r)(6)(iv)
40 C.F.R. § 52.21(r)(6)(vi)

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

CAA	Clean Air Act
DTE	DTE Energy Company and Detroit Edison Company
EPA	United States Environmental Protection Agency
MDEQ	Michigan Department of Environmental Quality
NOV	Notice of Violation
NSR	New Source Review
PSCR	Power Supply Cost Recovery
PSD	Prevention of Significant Deterioration

Before this case went to the Sixth Circuit, EPA intended to prove that the 2010 projects at Monroe Unit 2 were "major modifications" by second-guessing DTE's preconstruction projection. The fact that emissions had actually decreased following the project was of no moment—EPA argued it could meet its burden by convincing the Court that a "proper" projection would have predicted an increase in emissions caused by the projects. This Court rejected this view of NSR enforcement.

So did the Sixth Circuit. The NSR rules create a "project-and-report" system. *U.S. v. DTE Energy Co.*, 711 F.3d 643, 649 (6th Cir. 2013). EPA cannot "enforce" NSR by second-guessing the operator's projection, because that would create, in effect, a "prior approval" system. *Id.* "If operators had to defend every projection to the agency's satisfaction, companies would hesitate to make any changes, including those that may improve air quality." *Id.* The NSR Rules thus "take a middle road by trusting operators to make projections but giving them specific instructions to follow." *Id.* Accordingly, where the source has projected no increase in emissions due to the project, post-project data will dictate whether a modification has occurred. "If [the] company's projections are later proven incorrect, EPA can bring an enforcement action" alleging a major modification. *Id.* at 651. This system is "entirely compatible with the statute's intent, which ... is 'to prevent increases in air pollution.'" *Id.*

The Sixth Circuit thus explained this Court's "premises are largely correct." *Id.* at 649. It ultimately remanded the case, but not so EPA could attempt to prove by second-guessing that the 2010 projects were, in fact, major modifications—the Court squarely rejected that approach and carefully explained its "reversal does not constitute endorsement of EPA's suggestions." *Id.* at 652. Instead, it asked this Court to resolve a different question—whether DTE, "at a basic level ... [made] a projection in

compliance with how the projections are to be made." *Id.* at 649. But the Court was unambiguous this review could not devolve into "second-guess[ing]" and emphasized the availability of this limited type of enforcement action "does not mean that the agency gets *in effect* to require prior approval of the projections." *Id.* (emphasis added).

EPA makes clear in its response that it intends to ignore the vast majority of the Sixth Circuit's decision. Focusing solely on the demand growth exclusion, EPA contends that, had DTE conducted a "genuine" projection—i.e., the one concocted after the fact by EPA's litigation experts using methodologies that are not contained in the regulations—DTE would have projected an increase in emissions caused by the projects. At trial, EPA thus will ask the Court to rule that its experts' post hoc pre-construction projections are better than the one DTE actually conducted. This is *precisely* the type of enforcement action EPA described at oral argument that led Judge Rogers to observe: "That sounds like getting a permit to not get a permit. It sounds like you have to get approval from EPA as to your calculations before you can proceed without a permit." Oral Arg. at 50:39, Nov. 27, 2012. It is certainly a far cry from the action the Court envisioned, in which EPA would enforce the objective requirements—the specific "instructions"—in the regulations, such as whether "an operator ... uses an improper baseline period or uses the wrong number to determine whether a projected emissions increase is significant." *DTE*, 711 F.3d at 650.

EPA deviates even further by suggesting DTE should be held liable for failing to "demonstrate" that the demand growth exclusion applies. But EPA does not point to any "instructions" in the rules that require a source to "demonstrate" to EPA's satisfaction the correctness of its engineering judgment or specify how it would even do so. As the Court made clear, "the agency [does not] get[] in effect to require prior ap-

proval of the projections." *DTE*, 711 F.3d at 649. In some circumstances, the rules require the operator to provide notice of its projection, but this Court already has ruled that DTE complied with those regulations. Op. & Order (Op.) at 10, ECF No. 160. EPA did not challenge that ruling on appeal and cannot do so now.

Finally, and most fundamentally, the enforcement case EPA intends to pursue on remand is very different from the action the Sixth Circuit would allow. The Sixth Circuit authorized an action to determine, at a basic level, whether DTE complied with the "specific instructions" in the regulations governing projections. A finding of liability would justify, at most, a one-time civil penalty for a violation of the projection regulations, *see* 42 U.S.C. § 7413(b); 40 C.F.R. § 19.4, not a finding that projects that have not caused emissions to increase were, in fact, major modifications.

In short, EPA's view of NSR enforcement is at odds with the regulations and cannot be reconciled with the Sixth Circuit's decision. The material facts are undisputed, and they demonstrate that DTE complied with the specific instructions governing projections. That EPA's experts would reach a different conclusion based on different judgments is immaterial and cannot justify the denial of summary judgment.

FACTS MATERIAL TO THIS MOTION ARE NOT IN DISPUTE

EPA attempts to manufacture a dispute of material fact that would preclude the entry of summary judgment. EPA Br. at 4-9, ECF No. 178. But EPA's supposed factual disputes are immaterial to the question at hand and, indeed, highlight what EPA is trying to do here: second-guess DTE's projection. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unneces-

sary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Sixth Circuit established the governing law in its decision by carefully delineating the question this Court would be asked to answer—did DTE, "at a basic level," comply with the "specific instructions" governing preconstruction projections? The facts material to that question are set forth in DTE's opening brief, and they are undisputed. Specifically, DTE:

(1) Properly calculated baseline actual emissions.

(2) Considered "all relevant information" and projected its actual emissions for the 5 years following the project, identifying the "maximum annual rate ... at which [the unit] is projected to emit a regulated NSR pollutant in any one of [those] 5 years."

(3) Excluded emissions that, based on the company's business and engineering judgment and its understanding of the inputs used as part of its projection modeling, were unrelated to the project and could have been accommodated during the baseline period.

(4) Properly determined that projected actual emissions would not exceed baseline actual emissions.

See Defs.' MSJ Br. at 13-17, ECF No. 166. And significantly, emissions at Monroe 2 have decreased since the project. *Id.* at 18. If one were to turn back the clock and redo DTE's preconstruction projection today, the only "correct" projection would be one that shows a decrease in emissions.

These facts, which EPA does not dispute, fully resolve the question the Sixth Circuit asked this Court to answer. EPA instead focuses on facts—some of which are disputed, others of which are not—that are immaterial. For example, EPA chides DTE for replacing broken parts and components on Monroe 2, asserting that projects were "performed to eliminate problems that were causing the unit to break down repeatedly in the years before the project." EPA Br. at 4. But as the Sixth Circuit ob-

served, "the statute and regulations allow sources to replace parts indefinitely ... so long as none of those changes cause an emissions increase." *DTE*, 711 F.3d at 651.

EPA also notes that its expert Philip Hayet would have concluded that a significant portion of a projected increase in emissions was related to the project. But what some litigation expert might conclude based on different judgments and methodology is immaterial. It is just the type of "second-guess[ing]" the Sixth Circuit put off-limits.

EPA also asserts that "[t]o date, DTE has never offered a *genuine* explanation for how the increased operating hours projected by its PROMOD model could be unrelated to the project." EPA Br. at 8 (emphasis added). But EPA identifies no specific regulatory "instruction" that imposes such a requirement, much less one that instructs DTE on what EPA might deem "genuine." The regulations do not require DTE to "defend every projection to the agency's satisfaction." *DTE*, 711 F.3d at 649. The regulations instead require sources to provide notice to the relevant authority where there is a "reasonable possibility" of an increase in emissions, and even then, the source is not "require[d] ... to obtain any determination from [EPA] before beginning actual construction." 40 C.F.R. § 52.21(r)(6)(ii). And this Court specifically held that DTE's notice fully complied with the rules, and EPA did not challenge that ruling. In all events, the Sixth Circuit squarely rejected the suggestion that operators like DTE need buy-in from EPA before commencing construction.

ARGUMENT

I. The Sixth Circuit Forbade the Approach EPA Seeks to Apply Here.

EPA argues that summary judgment is not appropriate, because it could show at trial, through a team of experts, that the 2010 projects were major modifications

because DTE *should have* projected they would cause an increase in emissions. This is enforcement through second-guessing that the Sixth Circuit's decision forbids.

A. Post-Project Data Dictate Whether a Project Was a Modification.

EPA begins by eliding a key distinction drawn by the Sixth Circuit. Specifically, EPA asserts the Court held that "[t]he fact that emissions have (so far) gone down in the years after the overhaul does not shed any light on whether DTE followed the regulations in predicting emissions before the project." EPA Br. at 11. EPA goes on to suggest the Court held that the preconstruction projection "determines whether the project constitutes a 'major modification' and thus requires a permit." *Id.*

This is a blatant mischaracterization of the majority decision. In describing the "project-and-report" system created by the regulations, the Court explained that it is the "owners and operators" of major sources who must do a projection, and it is "*[t]hat* projection" that determines whether a pre-construction permit is needed. *DTE*, 711 F.3d at 644 (emphasis added). The Court then went on to emphasize that the validity of *that* preconstruction projection showing no increase in emissions caused by the project would be measured by *actual* post-project emissions:

> If a company's projections are later proven incorrect, EPA can bring an enforcement action. ... If post-construction emissions are higher than preconstruction emissions, and the increase does not fall under the demand growth exclusion, the operator faces large fines and will have to undertake another project at the source to install modern pollution-control technology.

Id. at 651. At no point does the Court suggest that operators will be deterred from under-projecting because a team of litigation experts retained by EPA will prove to a factfinder that their projection showing an increase in emissions is "better." And, if

the Court had accepted EPA's position, it would not have explicitly held that an operator may "keep its post-construction emissions down *in order to avoid* the significant increases *that would require a permit.*" *Id.* at 650 (emphases added).[1]

In fact, the Sixth Circuit majority specifically rejected EPA's position, both at oral argument and in its opinion. The exchange at oral argument is revealing:

> **JUDGE ROGERS**: [You] would have to say there's some Regulation which [DTE] interpreted incorrectly in making these projections. Is that correct?
>
> **MR. BENSON**: Well, I think what the District Court would find is that one side or the other's projection was inaccurate based on the facts. It is really a factual question, and then there is a legal question.
>
> **JUDGE ROGERS**: Alright. That puzzles me entirely.
>
> * * *
>
> **MR. BENSON**: [I]f there is a projection that complies with the regulations, there may be two different projections that both sort of on a superficial level meet the requirements of the regulations. But they would rely on different facts that would be found by the district court. ... And that is the type of analysis that EPA and the Company is going to do and in a court below *the court would have to decide whose analysis makes sense.*
>
> **JUDGE ROGERS**: Well here's the problem I have with that. *That sounds like getting a permit to not get a permit. It sounds like you have to get approval from EPA as to your calculations before you can proceed without a permit.*

Oral Arg. at 50:39, Nov. 27, 2012 (emphases added). The majority thus unsurprisingly made clear that the rules do not tolerate second-guessing:

> [I]f the agency can second-guess the making of the projections, then a project-and-report scheme would be transformed into a prior approval scheme.

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[1] The Court explained that this "is entirely consistent with the statute and regulations." *DTE,* 711 F.3d at 650. Indeed, DTE's practice of "purposely manag[ing] the cost of electricity from Monroe Unit #2 to keep its emissions from increasing ... further[s] the goal of the statute." *Id.* at 651.

> ... [A]t a basic level the operator has to make a projection in compliance with how the projections are to be made. But this does not mean that the agency gets *in effect* to require prior approval of the projections.

DTE, 711 F.3d at 649 (emphasis added).

The Court also specifically rejected EPA's conception of NSR enforcement through projection as a means of forcing sources to adopt modern emissions control technology. At oral argument, Judge Rogers observed in questioning EPA's counsel: "The only way you can really use a lever to force them to get a permit which would put them to a lower level than they now have is to second guess their projection in a way that projects it *higher than what even turns out to be reality.*" Oral Arg. at 46:20, Nov. 27, 2012 (emphasis added). And after endorsing the propriety of sources managing emissions to avoid emissions increases and NSR enforcement, the majority held that the definitions of "major modification" are

> incompatible with EPA's argument that [NSR] is a program designed to force every source to eventually adopt modern emissions control technology. ... As EPA conceded at oral argument, the statute and regulations allow sources to replace parts indefinitely without losing their grandfathered status so long as none of those changes cause an emissions increase.

DTE, 711 F.3d at 650-51. EPA ignores all of this in its response brief.

B. EPA's Approach Is Pure Second Guessing.

The Sixth Circuit remanded this case so that the Court could determine whether, at a basic level, DTE complied with the instructions for conducting projections—not to determine through second-guessing whether a major modification has occurred. EPA nonetheless tries to fit its Orwellian view of enforcement into the narrow window the Sixth Circuit allowed. Specifically, EPA argues that the ultimate question is whether DTE "should ... have projected an increase had it followed the

regulations." EPA Br. at 14. Unsurprisingly, EPA says that DTE should have expected an increase, relying on the same expert analysis it contends shows that DTE did not comply with the regulations. The reasoning is circular, and it allows for precisely the type of second-guessing the Sixth Circuit prohibited.

For example, EPA points to analyses by Mr. Hayat and Mr. Biewald, both of whom would opine that the projects should have been expected to cause an increase. *Id.* at 7. EPA also points to DTE's documents, which it (without irony) accuses DTE of "misconstru[ing]." *Id.* at 10. Both types of proof effectively transform NSR into a prior approval system, one where DTE's judgment is irrelevant, while the conclusions of outside litigation experts are deemed conclusive, and where DTE's understanding of its own documents and past practices is secondary to that of EPA's hired experts. This is the epitome of second-guessing.[2]

EPA also derides DTE's analysis as "conclusory," "incredible" and without "explanation." *Id.* at 10, 13, 18. In EPA's view, DTE was required somehow to "demonstrate" to EPA's satisfaction that the demand growth exclusion was applicable. *Id.* at 15. But EPA points to no "instruction" in the regulation that imposes such a requirement or to any provision that instructs operators how to make such a demonstration. To the contrary, the projection regulations direct only that the source

[2] EPA concedes DTE's projection considered not only "reduced outage rates" and "expected changes in demand," but also "numerous other[]" factors, EPA Br. at 19—factors DTE told EPA it considered. *See* March 12, 2010 DTE Notification Letter, at 2, ECF No. 166-3; June 1, 2010 DTE Letter in Response to § 114 Request, at 3-4, Ex. 3 to ECF No. 166-2; June 23, 2010 DTE Response to NOV, at 2-3, Ex. 4 to ECF No. 166-2. EPA's litigation expert would base his judgment on reduced outage rates alone, EPA Br. at 5, while ignoring other factors—quintessential second-guessing.

"[s]hall," after considering "all relevant information," exclude emissions that are "unrelated to the particular project" that it "could have accommodated"—an instruction that DTE indisputably satisfied. *See* Defs.' MSJ Br. at 15-16.

Intervenors at least attempt to try to find a hook in the regulations—they accuse DTE of "fail[ing] to provide the requisite explanation and documentation of its demand growth exclusion, as is required by 40 C.F.R. § 52.21(r)(6)(i)(c)." Intv'rs' Br. at 10, ECF No. 179. But the Intervenors ignore that this Court already held that the notice DTE submitted to the MDEQ fully complied with the regulations, Op. at 10, and that the Sixth Circuit agreed. *DTE*, 711 F.3d at 650. That claim cannot be resurrected now. *Rouse v. DaimlerChrysler Corp.*, 300 F.3d 711, 715 (6th Cir. 2002). More importantly, this Court's holding was not only correct (and unchallenged on appeal); its reasoning is directly applicable here and compels rejection of EPA's argument:

> While the explanation of the emissions exclusion in the Notice Letter is not very specific, and the accompanying table shows the results of the calculations without their back-up data, *Plaintiff does not point to any provision in Michigan's rules requiring specificity beyond that which was provided* ....

Op. at 12 (emphasis added). The same is true here: Plaintiffs point to no provision in the regulations that requires DTE to justify its projection with any more specificity beyond that which DTE provided.

In all events, the propriety of DTE's reliance on the demand growth exclusion is staring EPA right in the face—DTE performed the projects, but Monroe Unit 2's emissions have actually decreased, because low natural gas prices and the poor economy, among other factors, have depressed demand for coal-fired electricity. These data prove that DTE was right—the projected increase in emissions in DTE's projection was due to factors unrelated to the 2010 projects and thus was properly exclud-

ed.[3] EPA nonetheless asks the Court to hold that DTE should have (a) projected that emissions would increase (even though they have decreased); and (b) concluded that the increase was caused by the projects. This is "reality control" at its finest.

These "facts" are not offered to dispute EPA's assertions, but rather to demonstrate the obvious. If EPA is right, the trial would involve a battle of experts over whether DTE did a "proper" projection or provided a "genuine" explanation for its conclusions. If that's not second-guessing, it is hard to imagine what is.

II. EPA Has Not Alleged a Violation of Projection Regulations.

EPA cannot contend DTE undertook a "major modification." DTE projected that the 2010 projects at Monroe 2 would not cause an increase in emissions. Construction is now complete, so whether the projects were "major modifications" will be determined by actual emissions data, which show decreased emissions. *See supra* at 6-8. EPA instead must contend that DTE violated the projection regulations set forth in 40 C.F.R. § 52.21(b)(41)(ii). But EPA faces an insurmountable jurisdictional problem—it failed to allege any violation of the projection regulations in its NOV.

The authority to bring a claim—and this Court's jurisdiction to hear it—are premised on EPA's providing the required pre-suit notice. *See U.S. v. LTV Steel Co.*, 116 F.Supp 2d 624, 632 (W.D. Pa. 2000). EPA is only authorized to bring civil actions

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[3] DTE's 2009 and 2011 Power Supply Cost Recovery (PSCR) filings confirm the validity of DTE's projection. Like the 2010 PSCR filing, which formed the basis for the projection for the 2010 projects, the 2009 and 2011 PSCR filings accounted for the projects. As DTE told EPA, both of those filings indicated emissions would decrease at Monroe Unit 2, thus confirming the increase projected in the 2010 projection was due to factors unrelated to the projects. *See* June 23, 2010 DTE Response to NOV, at 3, Ex. 4 to ECF No. 166-2; King Expert Report, ECF No. 46-11.

under 42 U.S.C. § 7413(b) based on the "specific violation[s] alleged in the NOV." *U.S. v. AM General Corp.*, 808 F.Supp. 1353, 1362 (N.D. Ind. 1992). EPA's NOV thus defines the permissible scope of its complaint, and this Court has already held that EPA "is barred from pursuing claims not specified in its [NOV]." Op. at 12. Failure to comply with the notice requirements warrants dismissal for lack of subject matter jurisdiction. *U.S. v. Pan Am. Grain Mfg. Co.*, 29 F.Supp.2d 53, 56 (D.P.R. 1998).

In a footnote, EPA suggests that it *did* allege a violation of § 52.21(b)(41)(ii) on page 4 of its NOV. EPA Br. at 20-21 n.10. But nowhere on page 4 (or anywhere else) does EPA allege a violation of the projection regulations, much less the specific provisions of § 52.21(b)(41)(ii). Rather, the NOV relates *solely* to the allegation that DTE undertook a "major modification" at Monroe Unit 2, a contention that the Sixth Circuit ruled would be judged by post-project emissions data. *See, e.g.*, NOV at ¶ 25, ECF No. 8-8, ("DTE is in violation of PSD requirements ... for constructing a major modification."). That is very different from any claim based on a "specific" alleged violation of § 52.21(b)(41)(ii).[4] Because EPA failed to assert that claim in its NOV, this Court lacks jurisdiction to hear it.

CONCLUSION

For these reasons, DTE's motion for summary judgment should be granted.

Respectfully submitted, this 23rd day of August, 2013.

By: /s/ F. William Brownell

[4] EPA knows how to assert an alleged violation of the projection rules. In *U.S. v. Okla. Gas & Elec. Co.*, EPA recently alleged *not* that the utility undertook a "major modification," but that it "failed to include [in its notice to the state] a projection of post-project emissions as required by ... regulations." Compl. ¶ 44, No. 13-cv-690-D (W.D. Okla. filed July 8, 2013) (Ex. 1). There are no similar allegations here.

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2013, the foregoing **DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BASED ON COMPLIANCE WITH PRE-CONSTRUCTION PROJECTION REQUIREMENTS** was served electronically only on the following attorneys of record in accordance with an agreement reached among the parties:

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EXHIBIT 1
TO DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BASED ON COMPLIANCE WITH PRE-CONSTRUCTION PROJECTION REQUIREMENTS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

1. UNITED STATES OF AMERICA, Plaintiff, v. 1. OKLAHOMA GAS & ELECTRIC COMPANY Defendant.	)	Civil Action No. CIV-13-690-D

COMPLAINT FOR DECLARATORY RELIEF

The United States of America ("United States"), by the authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), alleges as follows:

NATURE OF THE ACTION

1. Pursuant to 28 U.S.C. §§ 2201(a) and 2202, the United States seeks a declaration that Oklahoma Gas and Electric Co., a subsidiary of OGE Energy Corp. ("Company" or "OG&E") failed to project emissions resulting from construction projects at its facilities as required by the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7401 *et seq.*, and EPA's implementing regulations, codified at 40 C.F.R. § 51.166, and as incorporated into Oklahoma's State Implementation Plan ("SIP") at OAPCR 1.4.1 - 1.4.4.

2. Specifically, the United States seeks a declaration that OG&E failed to project and assess future facility emissions as required by 42 U.S.C. § 7475 when the Company undertook various construction projects between 2003 and 2006 at its Muskogee and Sooner Plants, located in Fort Gibson and Red Rock, Oklahoma, respectively. *See also* 57 Fed. Reg. 32,314, 32,323, 32,325 (July 21, 1992) (describing the requisite "actual-to-future-actual" test for projecting future emissions); *id.* at 32,335–36 (codified at 40 C.F.R. § 51.166(b)(32) (defining "representative actual emissions")).

3. The Clean Air Act requires regulated facilities to anticipate future emissions increases that would result from physical changes, so that, if required, steps can be taken to prevent the increased emission of harmful air pollution. This assessment must occur before construction on a proposed project is undertaken. This statutory design serves to protect the public health and welfare, but it also best serves economic efficiency: if a project is likely to cause an increase in pollution, the proper pollution controls can be designed and installed at the same time, rather than forcing the unit to shut down a second time in order to install the required equipment.

4. OG&E performed numerous projects at its Muskogee and Sooner facilities without properly assessing the impact those projects would have on the plants' future emissions. The analyses performed by OG&E at the time are legally insufficient under the requirements of the CAA and EPA's regulations as incorporated into Oklahoma's SIP. By failing to comply with CAA regulations, OG&E deprived Plaintiff and the public of the ability to conduct a meaningful review of the effects of its modifications on air quality and public health.

JURISDICTION AND VENUE

5. This action seeks a declaration that OG&E did not, as a matter of law, project whether future emissions "would result" from various proposed construction projects as required by the CAA. This Court has jurisdiction to determine this federal question pursuant to 42 U.S.C. § 7413(b), and jurisdiction to issue a declaration pursuant to 28 U.S.C. §§ 2201–02.

6. Venue is proper in this District pursuant to Sections 113(b) of the Act, 42 U.S.C. § 7413(b), 28 U.S.C. §§ 1391(b) and (c), because OG&E's principal place of business is located within this district.

NOTICES

5. EPA issued a Notice of Violation ("NOV") to Defendant on April 26, 2011 pursuant to Section 113(a) and (b) of the Act, 42 U.S.C. §§ 7413(a) and (b), and provided a copy of the NOV to the State of Oklahoma.

6. The 30-day period between issuance of the NOV and commencement of a civil action, required under CAA Section 113, 42 U.S.C. § 7413, has elapsed.

7. The United States is providing notice of the commencement of this action to the appropriate state air quality control agency for the State of Oklahoma, Oklahoma Department of Environmental Quality ("ODEQ"), pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b).

AUTHORITY

8. Authority to bring this action is vested in the Attorney General of the United States by CAA Section 305, 42 U.S.C. § 7605, and pursuant to 28 U.S.C. §§ 516 and 519.

DEFENDANT

9. Defendant OG&E is a subsidiary of OGE Energy Corporation formed under the laws of the State of Oklahoma and has a mailing address of P.O. Box 321, Oklahoma City, Oklahoma 73101.

10. As a corporate entity, OG&E is a "person" within the meaning of CAA Section 302(e), 42 U.S.C. § 7602(e).

11. OG&E is the owner and/or operator of the Sooner Generating Station in Red Rock, Oklahoma.

12. OG&E is the owner and/or operator of the Muskogee Generating Station in Fort Gibson, Oklahoma.

13. OG&E's Sooner Plant consists, in part, of Units 1 and 2, which are coal-fired electric generating units. OG&E's Muskogee Plant consists, in part, of Units 4, 5, and 6, which are also coal-fired electric generating units. Coal-fired units include boilers that burn coal to convert water into steam, which is then used to generate electricity. Hot gases from the combustion of coal flow through the boiler and pass across and around groups of boiler tubes in the unit. The hot gases heat the water in these boiler tubes and convert it into steam. The steam generated in these boiler tubes is then sent to a series of steam turbines that spin a generator to produce electricity. The tubes in the boiler are

grouped into boiler tube components, which consist of massive arrays of numerous large steel tubes. Combustion gas exiting the boiler is used to preheat the air entering the boiler through the use of an air preheater, a series of enormous baskets with corrugated metal heat exchanging surface. The air preheater and boiler tube components such as the superheater, economizer, reheater, and lower slope tubes are major boiler components which can weigh many tons and cost millions of dollars to replace.

14. When a major component in a coal-fired electric generating unit breaks down, such as one of the components replaced by OG&E, it causes the unit to be taken out of service for repairs—events known as "forced outages." A deteriorated major component can cause increasing numbers of forced outages, as well as maintenance and scheduled outages needed to maintain the worn-out equipment, preventing the unit from generating electricity when it is needed. By replacing the worn-out component that is causing the outages, a utility can improve the unit's availability to operate more hours in a year. These additional hours of operation often translate into increased amounts of coal burned in the unit and more annual pollution emitted from the unit's smokestack into the atmosphere.

15. In addition to improving the availability of a coal-fired generating unit, replacing deteriorated components with new, improved components can also increase the capacity of the boiler to pass steam through the components to the turbines at greater volumes and/or at higher temperatures. This can result in an increase in the amount of coal burned, and pollution emitted, during each hour of the unit's operation. Even if a project does not increase the amount of coal burned per hour, an improved component

can increase the capacity and/or efficiency of the unit, which for coal-fired generating units like the Sooner and Muskogee Units, can make the units more cost-effective and thus more economical to operate than other units. Such modifications can lead the facility to operate that improved unit during more hours and/or at higher levels of operation, which in turn can lead to increases in coal burned at the unit and increased amounts of SO_2, NO_x, and other pollutants emitted from the unit's smokestack on an annual basis.

16. The emission of SO_2, NO_x, and other pollutants harms public health and the environment, contributing to premature mortality, aggregation of respiratory and cardiovascular disease, asthma attacks, acid rain, and other adverse effects in downwind communities and natural areas. *See, e.g.*, 73 Fed. Reg. 28,321, 28,324, 28,327–28 (May 16, 2008).

STATUTORY AND REGULATORY BACKGROUND

A. The Clean Air Act

17. The Clean Air Act is designed to protect and enhance the quality of the nation's air so as to promote the public health and welfare and the productive capacity of its population. Section 101(b)(1) of the Act, 42 U.S.C. § 7401(b)(1).

18. Section 109 of the Act, 42 U.S.C. § 7409, requires the Administrator of EPA to promulgate regulations establishing primary and secondary national ambient air quality standards ("NAAQS" or "ambient air quality standards") for those air pollutants ("criteria pollutants") for which air quality criteria have been issued pursuant to Section 108 of the Act, 42 U.S.C. § 7408, such as sulfur dioxide ("SO_2"), nitrogen oxides

("NO_x"), or particulate matter smaller than 2.5 microns ("$PM_{2.5}$"). 40 C.F.R. §§ 50.4, 50.5, 50.7, 50.11, and 50.13.

19. Under Section 107(d) of the Act, 42 U.S.C. § 7407(d), each state is required to designate those areas within its boundaries where the air quality is better or worse than the NAAQS for each criteria pollutant, or where the air quality cannot be classified due to insufficient data. An area that meets the NAAQS for a particular pollutant is termed an "attainment" area with respect to such pollutant. An area that does not meet the NAAQS for a particular pollutant is termed a "nonattainment" area with respect to such pollutant. An area that cannot be classified as either "attainment" or "nonattainment" with respect to a particular pollutant due to insufficient data is termed "unclassifiable" with respect to such pollutant.

20. Part C of Title I of the CAA, 42 U.S.C. §§ 7470-7492, sets forth requirements for the prevention of significant deterioration of air quality in those areas designated as either attainment or unclassifiable for purposes of meeting the NAAQS standards. These requirements are designed to protect public health and welfare, to assure that economic growth will occur in a manner consistent with the preservation of existing clean air resources, and to assure that any decision to permit increased air pollution is made only after careful evaluation of all the consequences of such a decision and after public participation in the decision making process. 42 U.S.C. § 7470. These provisions are referred to herein as the "PSD program."

21. As part of the PSD program, Section 165(a) of the Act, 42 U.S.C. § 7475(a), among other things, prohibits the "construction" of a "major emitting facility" in

an area designated as attainment or unclassifiable unless a permit has been issued that comports with the requirements of Section 165 and the facility employs the "Best Available Control Technology" ("BACT") for each pollutant subject to regulation under the Act that is emitted from the facility. Further, CAA Section 165(a)(3), 42 U.S.C. § 7475(a)(3), allows issuance of a PSD permit only if "the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility" will not compromise compliance with applicable air quality standards.

22. Section 169(2)(c) of the Act, 42 U.S.C. § 7479(2)(c), defines "construction" as including "modification" (as defined in CAA Section 111(a)). "Modification" is defined in CAA Section 111(a), 42 U.S.C. § 7411(a), to be "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."

23. By requiring pre-construction permitting and providing for pre-construction enforcement, the CAA thus requires sources to assess the projected impacts of their proposed modification projects before implementation in order to determine whether the PSD program requires the installation of BACT concurrent with that project's construction. Modified sources are thereafter subject to continuous emissions limitations.

B. Applicable Regulations

24. Pursuant to CAA Section 110, 42 U.S.C. § 7410, each State must adopt and submit to EPA for approval a State Implementation Plan ("SIP") that includes, among

other things, regulations to prevent the significant deterioration of air quality under CAA Sections 161-165, 42 U.S.C. §§ 7471-7475. Section 161 of the Act, 42 U.S.C. § 7471, requires that each applicable SIP contain a PSD program.

25. Pursuant to CAA Section 302(q), 42 U.S.C. § 7602(q), an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved by EPA pursuant to CAA Section 110, 42 U.S.C. § 7410, or promulgated by EPA pursuant to CAA Section 110(c), 42 U.S.C. § 7410(c), and which implements the relevant requirements of the Act. Upon EPA approval, SIP requirements are federally enforceable under Section 113 of the Act, 42 U.S.C. § 7413, and 40 C.F.R. § 52.23.

26. A state may comply with CAA Section 161, 42 U.S.C. § 7471, by having its own PSD regulations approved by EPA as part of its SIP, which must be at least as stringent as those set forth at 40 C.F.R. § 51.166. If a state does not have a PSD program that has been approved by EPA and incorporated into the SIP, then the EPA federal PSD regulations set forth at 40 C.F.R. § 52.21 shall be incorporated by reference into the SIP. 40 C.F.R. § 52.21(a).

27. EPA approved Oklahoma's PSD program on August 25, 1983. 48 Fed. Reg. 38, 635. The state of Oklahoma's PSD program is part of the Oklahoma Air Pollution Control Regulations ("OAPCR"). OAPCR 1.4.1 – 1.4.4 (1983). On February 13, 1980, EPA approved the Oklahoma Department of Environmental Quality's ("ODEQ" or "Oklahoma") Air Quality Control Implementation Plan, which Oklahoma later re-designated the Oklahoma SIP. 45 Fed. Reg. 9,733 (Feb. 13, 1980). Since then,

EPA has reviewed and approved various amendments and revisions to the SIP, 40 C.F.R. § 52.1960 (setting forth EPA actions taken in regards to the Oklahoma SIP), but the substance of Oklahoma's pertinent PSD provisions remained untouched for all times relevant to this action, *see*, *e.g.*, 64 Fed. Reg. 59,629 (Nov. 3, 1999) (approving only a re-codification of SIP provisions).

28. The Oklahoma PSD program, as codified in the SIP, requires PSD permits for "major modifications" to major sources of air pollution. OAPCR 1.4.1(c)(1). Major sources of air pollution include certain enumerated categories of facilities which emit, or have the potential to emit, 100 tons per year or more of any CAA regulated air pollutant. The Oklahoma SIP includes fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input as one of these regulated major sources. OAPCR 1.4.4(b)(1)(A).

29. The Oklahoma PSD program, as codified in the SIP, has defined a "major modification" as any physical change or change in the method of operation of a major stationary source that "would result" in a significant net emissions increase of a regulated NSR pollutant. OOAPCR 1.4.4(b)(2)(A).

30. The Oklahoma PSD program, as codified in the SIP, has defined a "net emissions increase" as the increase in emissions from a particular physical change or change in the method of operation at a stationary source or any other increases and decreases in actual emissions at the major stationary source that are contemporaneous with the particular change and are otherwise creditable. *See* OAPCR 1.4.4(b)(3)(A); 1.4.4(b)(22)(A).

31. The Oklahoma PSD program, as codified in the SIP, has defined a "significant" net emissions increase as a net emissions increase that would equal or exceed 40 tons per year of SO_2 and 40 tons per year of NO_x. OAPCR 1.4.4(b)(22)(A).

32. Prior to commencing construction on plant modifications, a utility must, *inter alia*, evaluate whether those projects "would result in a significant net emissions increase of any pollutant subject to regulation." OAPCR 1.4.4(b)(2).

33. A company makes such an evaluation by comparing its pre-construction baseline emissions with a projection of the future post-project emissions that are likely to result from the project. *See* 42 U.S.C. § 7475(a); 57 Fed. Reg. 32,314, 32,335–36 (July 21, 1992); 56 Fed. Reg. 27,630, 27630-33 & n. 10 (June 14, 1991); 45 Fed. Reg. 52,725 (Aug. 7, 1980); OAPCR 1.4.2(a)(1); 1.4.4(f)(1)(B); OAPCR 1.4.2(c).

34. The regulations do not authorize a source to make an unenforceable promise to limit emissions once a project has been implemented in lieu of performing the CAA-required, project-specific projection of likely future emissions.

C. The Declaratory Judgment Act

35. Pursuant to 28 U.S.C. § 2201(a), any court of the United States may, in a case of actual controversy within its jurisdiction, "declare the rights and other legal relations of any interested party seeking such a declaration, whether or not further relief is or could be sought."

36. 28 U.S.C. § 2202 provides that "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

ENFORCEMENT PROVISIONS

37. Sections 113(a)(1) and (3) of the Act, 42 U.S.C. §§ 7413(a)(1) and (3), provide that the Administrator may bring a civil action in accordance with Section 113(b) of the Act, 42 U.S.C. § 7413(b), whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of, *inter alia*, the PSD requirements of Section 165(a) of the Act, 42 U.S.C. § 7475(a), or any rule or permit issued thereunder; or the provisions of any approved SIP or any permit issued thereunder.

38. 40 C.F.R. § 52.23 provides, *inter alia*, that any failure by a person to comply with any provision of 40 C.F.R. Part 52, or with any approved regulatory provision of a SIP, shall render such person in violation of the applicable SIP, and subject to enforcement action pursuant to Section 113 of the Act, 42 U.S.C. §7413.

39. Section 167 of the Act, 42 U.S.C. § 7477, authorizes the Administrator to initiate an action for injunctive relief to prevent the construction, modification or operation of a major emitting facility which does not conform to the PSD requirements of the Act. This pre-construction enforcement authority pre-supposes that projects will be fully evaluated before construction begins.

GENERAL ALLEGATIONS

40. Paragraphs 1 through 39 are realleged and incorporated by reference.

41. The Muskogee and Sooner Plants are located in Muskogee County, Oklahoma, and Noble County, Oklahoma, respectively. At all times relevant to the claims in this Complaint, Muskogee and Noble Counties have been areas designated as in

attainment or unclassifiable with the NAAQS for SO_2, NO_x, and PM and are thus subject to PSD regulations for modifications or construction at the facilities. 40 C.F.R. § 81.337.

42. Between 2003 and 2006, OG&E undertook a suite of renovation projects at its Sooner and Muskogee generating facilities. Specifically:

a. On or about September 18, 2003, OG&E began actual construction of an approximately $3.73 million overhaul of Muskogee Unit 4 that was completed and became operational on or about October 26, 2003. These modifications included one or more physical changes at Muskogee Unit 4 including the complete replacement and reconfiguration of the economizer. OG&E identified this modification as a "reliability" and "end of life" project intended to "greatly enhance the operability, efficiency, and maximum continuous net generation" of Muskogee Unit 4.

b. On or about February 13, 2004, OG&E began actual construction of an approximately $2.5 million overhaul of Sooner Unit 2 that was completed and became operational on or about April 18, 2004. This modification included one or more physical changes at Sooner Unit 2 including replacement of the economizer. OG&E identified this modification as a "reliability," and "end of life" project intended to "greatly enhance the operability, efficiency, and maximum continuous net generation" of Sooner Unit 2.

c. On or about April 6, 2004, OG&E began actual construction of an approximately $10.2 million overhaul of Muskogee Unit 5 that was completed and became operational on or about May 28, 2004. These modifications included one

or more physical changes at Muskogee Unit 5 including the replacement of turbine blades and the addition of heat transfer surface in the boiler. OG&E identified these modifications as "capacity" projects necessary for the implementation of a "new advanced design steam path."

d. On or about October 16, 2004, OG&E began actual construction of an approximately $10.8 million overhaul of Muskogee Unit 6 that was completed and became operational on or about December 21, 2004. These modifications included one or more physical changes at Muskogee Unit 6 including the replacement of turbine blades and the addition of heat transfer surface in the boiler. OG&E identified these modifications as "capacity" projects necessary for the implementation of a "new advanced design steam path."

e. On or about February 11, 2005, OG&E began actual construction of an approximately $5.8 million overhaul of Muskogee Unit 4 that was completed and became operational on or about April 22, 2005. These modifications included one or more physical changes at Muskogee Unit 4 including the replacement of turbine blades and the addition of heat transfer surface in the boiler. OG&E identified these modifications as "capacity" projects necessary for the implementation of a "new advanced design steam path."

f. On or about September 19, 2005, OG&E began actual construction of an approximately $4.33 million overhaul of Muskogee Unit 5 that was completed and became operational on or about December 2, 2005. These modifications included one or more physical changes at Muskogee Unit 5

including the replacement of the economizer and low pressure blades as well as various other upgrades to the steam turbine system. OG&E identified these modifications as "reliability" and "end of life" projects intended to "greatly enhance the operability, efficiency, and maximum continuous net generation" of Muskogee Unit 5.

g. On or about January 27, 2006, OG&E began actual construction of an approximately $12.4 million overhaul of Sooner Unit 1 that was completed and became operational on or about March 7, 2006. These modifications included one or more physical changes at Sooner Unit 1 including the replacement of the economizer, turbine rotor, and low pressure blades as well as the addition of heat transfer surface in the boiler. OG&E identified these modifications as "reliability," "capacity," and "end of life" projects intended to "greatly enhance the operability, efficiency, and maximum continuous net generation" of Sooner Unit 1.

h. On or about October 23, 2006, OG&E began actual construction of an approximately $11.1 million overhaul of Sooner Unit 2 that was completed and became operational on or about December 18, 2006. These modifications included one or more physical changes at Sooner Unit 2 including the replacement of turbine blades, the rotor, and the addition of heat transfer surface in the boiler. OG&E identified these modifications as "capacity" projects necessary for the implementation of a "new advanced design steam path."

43. OG&E did not seek a PSD permit for any of the projects described in paragraphs 42(a) through 42(h) above.

44. At or around the time OG&E began construction on the projects described in paragraphs 42(a) through 42(h) above, OG&E sent a report to ODEQ describing each project and purporting to set forth NSR applicability analyses for each project. In each instance, OG&E failed to include a projection of post-project emissions as required by EPA and ODEQ regulations.

45. Instead, in each letter, the company "propose[d]" to "limit emissions" from the generating units "such that the emission increase [would] not exceed the PSD significant threshold increase level" during the five years following each project. OG&E described this as its "proposed plan of action for compliance" with the CAA's PSD requirements.

46. OG&E's emissions analysis is insufficient under the CAA and implementing regulations.

47. OG&E has relied on this approach to evade the requisite preconstruction PSD project analysis and applicability determination. As such, there exists an immediate and substantial controversy between the United States and OG&E with regard to the interpretation and proper application of the Clean Air Act and associated implementing regulations. Resolution of this controversy is central to the evaluation and resolution of any illegal construction violations related to the projects described in paragraphs 42(a) through 42(h) above.

CLAIM FOR RELIEF

Declaratory Judgment

48. Paragraphs 1 through 47 are realleged and incorporated by reference.

49. OG&E failed, as a matter of law, to evaluate whether each project listed in paragraphs 42(a) through 42(h) "would result" in a significant increase in post-project emissions of regulated pollutants at each modified facility. OAPCR 1.4.4(b)(2); 42 U.S.C. § 7475(a).

50. Because of this immediate and substantial controversy, the United States requests a declaration from the Court that:

a. OG&E's project assessments did not comply with the CAA's pre-project emissions analysis requirements in the Oklahoma SIP, and

b. OG&E's "proposed plan of action for compliance" is insufficient as a matter of law to comply with applicable PSD requirements.

PRAYER FOR RELIEF

WHEREFORE, PLAINTIFF prays that the Court:

51. Issue a declaratory judgment, pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure, that OG&E did not assess the impact of its projects on future emissions, and that OG&E's "proposed plan of action for compliance" does not comply with the CAA or the state or federal regulations adopted to implement the CAA's PSD requirements;

52. Require OG&E to properly assess whether its projects were likely to result in a significant emissions increase or a significant net emissions increase and to submit that assessment of its projects to EPA within 90 days of the issuance of the order, to be evaluated and permitted as necessary thereafter; and

53. Award such other and further relief as is just and equitable.

Dated: July 8, 2013

Respectfully Submitted,

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